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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 399

[Docket No. DOT-OST-2019-0182]

RIN 2105-ZA18

Guidance Regarding Interpretation of Unfair and Deceptive Practices

AGENCY: Office of the Secretary (OST), U.S. Department of Transportation (DOT).

ACTION: Guidance regarding interpretation of unfair and deceptive practices.

SUMMARY: The U.S. Department of Transportation (DOT or the Department) is issuing a guidance document to inform the public and regulated entities about DOT's interpretation of the terms unfair, deceptive, and practices as it relates to its statutory authority to prohibit unfair or deceptive practices. The Department is taking this action to better define the terms unfair and deceptive in response to an Executive order issued by President Biden on July 9, 2021, on promoting competition in the American economy.

DATES: This final guidance document is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: This guidance will appear on the Department's aviation consumer protection web site at https://www.transportation.gov/airconsumer/guidance-aviation-rules-and-statutes. The Department's final rule regarding unfair and deceptive practices and related documents are available on the docket at https://www.regulations.gov; follow the online instructions for accessing DOT-OST-2019-0182.

FOR FURTHER INFORMATION CONTACT: Robert Gorman, Kimberly Graber, or Blane Workie, Office of Aviation Consumer Protection, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC 20590, 202-366-9342, 202-366-7152 (fax); robert.gorman@dot.gov; kimberly.graber@dot.gov; or blane.workie@dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

Background

The Department's authority to regulate unfair and deceptive practices in air transportation or the sale of air transportation is found at 49 U.S.C. 41712 ("section 41712").[1] Section 41712(a) gives the Department the authority to investigate and decide whether an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice in air transportation or the sale of air transportation. In addition to this general provision, Congress has also defined two specific practices as being unfair or deceptive.[2]

The Department also has general authority to issue regulations necessary to carry out section 41712. Many of the Department's existing aviation consumer protection rules were issued under the authority of section 41712, including but not limited to the tarmac delay rule,[3] the full-fare advertising rule,[4] the prohibition on post-purchase price increases,[5] and the rules on oversales and denied boarding compensation.[6]

Section 41712 does not define "unfair," "deceptive," or "practice." On December 7, 2020, the Department issued a final rule titled "Defining Unfair or Deceptive Practices" ("UDP Final Rule").[7] In this rule, the Department noted that section 41712 was modeled on section 5 of

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[1] In addition to section 41712, the Department's authority to regulate unfair and deceptive practices is based in the Department's rulemaking authority under 49 U.S.C. 40113, which states that the Department may take action that it considers necessary to carry out this part, including prescribing regulations.

[2] *See* 49 U.S.C. 41712(b) (failing to notify the purchaser of such an electronic ticket of its expiration date, if any, is unfair or deceptive within the meaning of section 41712(a)); 49 U.S.C. 41712(c) (failing to disclose the name of the air carrier providing the air transportation, as required by statute, is unfair or deceptive within the meaning of section 41712(a)).

[3] 14 CFR 259.4.

[4] 14 CFR 399.84(a).

[5] 14 CFR 399.88(a).

[6] 14 CFR part 250.

[7] 85 FR 78707 (December 7, 2020); available at https://www.federalregister.gov/documents/2020/12/07/2020-26416/defining-unfair-or-deceptive-practices.

the Federal Trade Commission (FTC) Act.[8] The Department explained that while section 5 vests FTC with broad authority to prohibit unfair or deceptive practices in most industries, Congress granted the Department the exclusive authority to prohibit unfair or deceptive practices of air carriers and foreign air carriers. The Department noted that DOT and FTC share the authority to prohibit unfair or deceptive practices by ticket agents in the *sale* of air transportation.

Accordingly, DOT determined that it was appropriate to define the terms "unfair" and "deceptive" in ways that reflect both FTC precedent and DOT's own long-standing interpretation of those terms. Specifically, DOT defined a practice as being *unfair* to consumers if "it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition."[9] DOT defined a practice as being *deceptive* to consumers "if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A matter is material if it is likely to have affected the consumer's conduct or decision with respect to a product or service."[10] Like FTC, the Department stated that proof of intent is not necessary to establish either unfairness or deception.[11] The Department found it unnecessary to define "practice."[12]

Among its major provisions, the UDP Final Rule requires DOT to employ its definitions of "unfair" and "deceptive" when issuing future rulemakings or taking future enforcement action.[13] The rule provided, however, that if Congress directs DOT by statute to issue regulations specifically declaring a practice to be unfair or deceptive, then DOT may do so

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[8] 15 U.S.C. 45.

[9] 14 CFR 399.79(b)(1).

[10] 14 CFR 399.79(b)(2).

[11] 14 CFR 399.79(c).

[12] 85 FR 78710.

[13] 14 CFR 399.75(a)(rulemaking); 399.75(b)(enforcement).

without reference to the general definitions.[14] The rule also clarified that if a specific regulation already applies to the conduct at issue, then the Department may rely on the terms of that regulation.[15]

On July 9, 2021, the President issued Executive Order 14036, ‘‘Promoting Competition in the American Economy.”[16] That Order directed the Department to take a number of actions to protect aviation consumers, including that the Department start development of proposed amendments to its definitions of the terms “unfair” and “deceptive” in section 41712. Pursuant to the Executive Order, DOT stated that it would fulfill the requirements of the Executive Order by issuing an interpretive rule (i.e., this guidance document) that would clearly apprise the public of the Department’s interpretation of the definitions of the terms “unfair” and “deceptive.”[17]

Guidance Regarding Interpretation of Unfair and Deceptive Practices

The purpose of this guidance document is to provide the public and regulated entities with greater transparency with respect to DOT’s Office of Aviation Consumer Protection (OACP)’s interpretation of the terms that are found in section 41712 and defined in the Department’s regulations at 14 CFR 399.79. This guidance document does not have the force and effect of law, is not legally binding in its own right, and will not be relied on by the Department as a separate basis for enforcement or other administrative penalty beyond the underlying authorities in statute and regulation.

Elements of Unfairness

In the Department’s final rule titled “Defining Unfair or Deceptive Practices” (“UDP Final Rule”), DOT defined a practice as “unfair” if it “causes or is likely to cause substantial

[14] 14 CFR 399.75(a).

[15] 14 CFR 399.79(d).

[16] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[17] “Procedures in Regulating Unfair or Deceptive Practices,” 87 FR 5655 (Feb. 2, 2022).

injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition."[18] We will address each element in turn.

1. "Causes or is likely to cause"

In keeping with FTC precedent, DOT is of the view that a practice may "cause" harm even if it is not the *only* cause of the harm, and even if it is not the most proximate cause of the harm.[19] Moreover, the Department is not required to wait for substantial injury to take place before taking action against an unfair practice. The Department may take action against practices which are "likely to cause" substantial injury as well.[20] When making such determinations, DOT examines not only the probability of the harm occurring, but also the magnitude of the injury if it does occur. As FTC has observed, "a practice may be unfair if the magnitude of the potential injury is large, even if the likelihood of the injury occurring is low."[21]

2. "Substantial" injury

The UDP Final Rule uses the terms "harm" and "injury" interchangeably.[22] The Department did not define "substantial injury" in the UDP Final Rule, other than observing that the term "would necessarily exclude trivial or speculative" harm.[23]

Substantial injury would be determined by the totality of the circumstances. As FTC has written, "it is well established that substantial injury may be demonstrated by a showing of a small amount of harm to a large number of people, as well as a large amount of harm to a small number of people."[24] Substantial harm is typically of an economic nature. For example, the

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[18] 14 CFR 399.79(b).

[19] Opinion of the Commission, *In the Matter of LabMD, Inc.* (July 19, 2016) at 10, available at https://www.ftc.gov/system/files/documents/cases/160729labmd-opinion.pdf ("*LabMD"*).

[20] FTC has similar authority to declare a practice unfair if it is *likely* to cause substantial injury. *See* 15 U.S.C. 45(n).

[21] *LabMD* at 10.

[22] 14 CFR 399.79(b).

[23] 85 FR 78710 n. 25.

[24] *LabMD* at 9.

Department has found that delay in providing refunds to consumers constitutes substantial harm to consumers who did not receive the service they paid for and did not have access to their money for a significant time.[25] However, it is well established that harm need not be financial in order to be substantial. For example, the Department found that delaying passengers on the tarmac for a substantial length of time without the opportunity to deplane or without adequate food, water, lavatory facilities, and medical attention imposes substantial harm.[26] Substantial harm may also be found in intangible injury, such as to an individual's privacy or reputation.[27] Extended delays in obtaining relief, and the time and expense of pursuing a claim, can also constitute substantial harm.[28]

3. Not reasonably avoidable

For a practice to be unfair, the harm must not have been reasonably avoidable by the consumer.[29] For example, a lengthy tarmac delay imposes unavoidable harm because the passenger lacks the opportunity to deplane. It has also been the longstanding view of OACP that it would be an unfair practice for a carrier to fail to provide a refund, on request, for flights to or

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[25] *See* Order and Settlement Agreement, Nov. 23, 2021 (available at https://www.transportation.gov/sites/dot.gov/files/2021-11/Air%20Canada%20-%20Order%20And%20Settlement%20Agreement.pdf) ("Air Canada Order") at 5.

[26] *See* "Enhancing Airline Passenger Protections," 74 FR 68983 (Dec. 30, 2009); available at https://www.federalregister.gov/documents/2009/12/30/E9-30615/enhancing-airline-passenger-protections (also noting that the rule was also premised on an airline's statutory duty to provide "safe and adequate" interstate air transportation).

[27] Mishandling the private information of consumers may be considered an unfair or deceptive practice within the meaning of section 41712. *See* https://www.transportation.gov/individuals/aviation-consumer-protection/privacy; *see also LabMD* at 19 ("the privacy harm resulting from the unauthorized disclosure of sensitive health or medical information is *in and of itself* a substantial injury under section 5(n)," even without further evidence that the information was used to cause further harm); *Spokeo, Inc. v. Robbins*, 578 U.S. 330 (2016) "intangible injuries may nevertheless be concrete" for purposes of satisfying the case or controversy requirement of standing in Article III courts).

[28] Air Canada Order at 5; *see also* DOT Order 2009-9-8 (2009) at 5.

[29] *See* FTC Policy Statement on Unfairness, available at https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness (FTC generally does not intend to second-guess the wisdom of consumer decisions, but it does intend to halt seller behavior that "unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.")

from the United States that were canceled or significantly changed by the carrier, in part because the harm was not reasonably avoidable by the traveler. We came to this conclusion even if the passenger purchased a "non-refundable" ticket. We concluded that a consumer acting reasonably would believe that he or she was entitled to a refund under U.S. law if the carrier cancelled or significantly changed the flight, regardless of the reason for the cancellation or significant change. We further concluded that a reasonable consumer would not believe that it is necessary to purchase a more expensive refundable ticket in order to be able to recoup the ticket price when the *airline* fails to provide the service paid for through no action or fault of the consumer, because reasonable consumers understand that "refundable" tickets are valuable because they ensure a refund if the *passenger* cancels the flight.[30] The Department has issued a notice of proposed rulemaking that would propose to codify OACP's interpretation that section 41712 requires airlines to provide prompt refunds when a carrier cancels or makes a significant change and the passenger does not take an alternative flight offered by the airline, including when the original ticket purchased is non-refundable.[31]

The Department looks at this element from the perspective of an ordinary consumer acting reasonably under the totality of the circumstances. For example, we have found that a passenger who triggered an airline's fraud-detection system and lost frequent flyer miles could have reasonably avoided that harm by not repeatedly entering fictitious information into the airline's reservation system.[32]

4. Harm not outweighed by benefits to consumers or competition

Finally, the harm must not be outweighed by benefits to consumers or to competition. Like FTC, the Department recognizes that some practices may be harmful to consumers in some

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[30] Air Canada Order at 5.

[31] 87 FR 51550 (August 22, 2022), available at https://www.federalregister.gov/documents/2022/08/22/2022-16853/airline-ticket-refunds-and-consumer-protections.

[32] DOT Order 2016-12-11, at 3.

respects, but beneficial to consumers in other respects. For example, offsetting benefits may include lower prices or a wider availability of products and services resulting from competition. The Department seeks to regulate practices that are harmful to consumers in their net effects.[33] Importantly, the Department does not compare the harm to the consumer against the benefits that the *airline or ticket agent* may obtain from the practice.[34] The Department's determination to regulate an unfair and deceptive practice would also be informed by a regulatory impact analysis.

5. Public policy considerations

As we noted in the UDP Final Rule, DOT has a broad statutory responsibility to consider a wide variety of public policies enumerated by Congress.[35] In fact, Congress has directed the Department in carrying out its aviation economic programs such as regulations under section 41712 to consider certain enumerated factors as being in the public interest. These factors include "the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices" and "preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation."[36] DOT considers public policy as established by both the Executive branch (e.g., regulation, Executive Order[37]) and the Legislative branch (e.g., statute, sense of Congress) of the Federal Government as appropriate, when determining whether a practice is unfair.

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[33] Air Canada Order at 5; *see also* the Department's oversales rule, 14 CFR Part 250, which also reflects this balance. The rule is carefully crafted to allow airlines to oversell flights in order to fill seats that would have otherwise gone empty due to "no-shows." In exchange for this ability to overbook flights (which would otherwise be unfair or deceptive), the Department requires airlines to compensate and provide protections to passengers who were involuntarily denied boarding in accordance with the rule. *See* DOT Order 2020-6-5.

[34] *See* Air Canada Order at 6 (finding that the practice of retaining passenger funds for canceled flights beyond the time frames allowed by law conveyed no benefit to consumers, even if the practice may have benefited the airline).

[35] 85 FR 78710.

[36] 49 U.S.C. 40101(a).

[37] E.g., Executive Order on Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/08/executive-order-on-catalyzing-clean-energy-industries-and-jobs-through-federal-sustainability/; Biden Administration Advances the Future of Sustainable Fuels in American Aviation, https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/09/fact-sheet-biden-administration-advances-the-future-of-sustainable-fuels-in-american-aviation/.

As a public policy matter, the Department has found that discriminatory conduct in and of itself constitutes an unfair practice. In this regard, orders of the Department and its predecessor Civil Aeronautics Board (CAB) support the position that violations of statutes that prohibit discrimination constitute unfair and deceptive practices. For example, the CAB determined that unlawful disparate treatment of consumers by a carrier in its ticket-by-mail procedures based on the consumer's ZIP code, which had the effect of discriminating against African-Americans in New York City, is an unfair practice.[38] The Department has also consistently found that violation of the Air Carrier Access Act, which prohibits U.S. and foreign air carriers from discriminating against passengers with disabilities, is an unfair practice. [39] Similarly, the Department has found that discrimination against individuals based on their race, color, national origin, religion, ancestry or sex is an unfair practice.[40]

Elements of Deception

In the UDP Final Rule, DOT defined a practice as "deceptive" if it "is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A matter is material if it is likely to have affected the consumer's conduct or decision with respect to a product or service."[41] We will address these elements in turn.

1. Likely to mislead a consumer

First, the practice must be likely to mislead the consumer. As FTC has explained, express misrepresentations, implied representations, and omissions are all potentially

[38] Miscellaneous Economic Orders, 78 C.A.B. 860 (1978): Docket 33219, Enforcement re Ticket-by-Mail, order 78-8-101, available via HeinOnline.

[39] *See, e.g.,* DOT Order 2018-11-8.

[40] *See, e.g.,* DOT Order 2012-5-2.

[41] 14 CFR 399.79(b)(2).

actionable.[42] A failure to provide services as promised (whether by contract or otherwise) can also be deceptive.[43]

The Department's full-fare advertising rule is based on its authority to prohibit deceptive practices.[44] Put simply, this rule requires advertised prices for air transportation to be the entire price to be paid by the customer to the carrier, or agent, for such air transportation. The Department based its rule on evidence that consumers believed that they were going to pay a particular advertised price for air transportation, only to find that the price was substantially higher due to additional taxes and fees.[45] The rule also requires any charges that are listed as components of the entire price (e.g., taxes) not to be false or misleading.

We have also found that advertising a fare that is no longer available, or failing to have a reasonable number of seats available at the advertised fare, is deceptive.[46] The Department has also found that an airline's failure to comply with its publicly posted Customer Service Plan is deceptive, because the carrier failed to abide by its commitment to provide services as promised.[47]

2. Acting reasonably under the circumstances

Like FTC, the Department views deception from the perspective of an ordinary consumer acting reasonably in the circumstances.[48] FTC has noted that entities are not responsible for the

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[42] FTC *1983 Policy Statement on Deception*, available at https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception.

[43] *Id.; see also* DOT Order 2013-3-12 (airline acted deceptively when it stated on its web site that certain conditions of carriage, including EU-mandated compensation for cancelled flights, would apply to international travel to and from the U.S., but then refused to abide by those conditions).

[44] 14 CFR 399.84(a).

[45] https://www.federalregister.gov/documents/2011/04/25/2011-9736/enhancing-airline-passenger-protections

[46] DOT Order 2022-2-6. While this practice is deceptive even in the absence of a specific regulation, we have also found that this practice violates the full-fare advertising rule, 14 CFR 399.84(a).

[47] DOT Order 2018-5-27; DOT Order 2016-8-33.

[48] On occasion, the Department receives complaints from sophisticated consumers who were not personally deceived by a practice because they are unusually knowledgeable. We have rejected airlines' claims that such complaints must be dismissed because the individual complainants themselves were not deceived. We reasoned that

unreasonable interpretations of a handful of individuals, or for broad statements of feeling or opinion.[49] Likewise, in the preamble to the UDP Final Rule, we noted that willful, intentional, or reckless consumer behavior that leads to self-imposed harm would likely not be covered.[50]

However, if a representation may be interpreted in two different but reasonable ways, one of which is false, the entity may be liable for the misleading interpretation. Like FTC, the Department will look to all of the factors surrounding the statement to determine reasonableness, including how clear, conspicuous, and significant the representation is, the familiarity of the public with the product, and the availability of alternate sources for the information.[51]

3. Material matter

The Department has adopted FTC's standard that the deception must regard a "material" matter, which is a matter that is likely to have affected the consumer's conduct or decision with regard to a product or service. In such a case, "consumer injury is likely, because consumers are likely to have chosen differently but for the deception."[52]

For example, the Department has found that the practice of mischaracterizing a carrier-imposed fee as a "tax" is deceptive.[53] We concluded that a reasonable consumer may choose to pay a "tax" under the reasonable belief that a tax is unavoidable, but that same consumer may choose to shop elsewhere in order to avoid a carrier-imposed fee. We have also found that an

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we must view the practice from the perspective of the ordinary consumer who may be unaware of the deception and are therefore less likely to file complaints. *See*, e.g., DOT Order 2016-12-12.

[49] *See* DOT Order 92-5-60 (1992) (finding that the terms of an airline's frequent flyer programs were not deceptive simply because consumers may have assumed that airlines could not make such changes to the program, or were surprised that miles could not be sold, when the terms of the plan themselves were clear); DOT Order 2012-12-11 (airline did not commit a deceptive practice by failing to warn a passenger that his actions would trigger its fraud-detection system when the passenger acted unreasonably in accessing the airline's reservation system).

[50] We have issued specific guidance regarding cases where passengers intentionally purchase fares that they know or should have reason to know are mistaken. See https://www.transportation.gov/airconsumer/mistaken-fare-policy-statement-050815. Mistaken fares are also governed by the rule relating to post-purchase price increases, 14 CFR 399.88.

[51] FTC Policy Statement on Deception, section 3.

[52] FTC Policy Statement on Deception, section 4.

[53] DOT Order 2018-5-32.

airline acted deceptively when it promised a universally available discount for prepaid baggage fees, when that discount was not available if the customer purchased the ticket through a third-party web site.[54] In contrast, we have found that errors that appear only in post-purchase receipts are misleading, but not deceptive for purposes of section 41712, because there was no evidence in that case that an error in a *post*-purchase receipt influenced the consumer's *pre*-purchase decision.[55]

It is important to note that the "product or service" is not limited to the initial purchase, however. For example, we have found that an airline acted deceptively when it responded to consumer complaints about denied boarding compensation by stating that it complied with "DOT and FAA regulations," when no such regulations existed. We found that such misrepresentations could have dissuaded consumers from pursuing valid complaints with the Department.[56] We have also found that misrepresentations relating to cancellation fees were deceptive within the meaning of section 41712.[57]

Practice

FTC has the statutory authority to prohibit unfair or deceptive "*acts or* practices" in or affecting commerce.[58] Section 41712, however, refers only to "practices."[59] In the UDP Final Rule, we explained that our aviation consumer protection regulations are always directed to practices of an airline or ticket agent, rather than isolated acts of individual employees. We also explained that our enforcement efforts include a determination that the conduct in question

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[54] DOT Order 2013-7-11.

[55] DOT Order 2018-5-32.

[56] DOT Order 2009-9-8.

[57] DOT Order 2022-2-6.

[58] 15 U.S.C. 45(a)(1). The FTC Act prohibits FTC from exercising jurisdiction over "air carriers and foreign air carriers subject to part A of subtitle VII of title 49." 15 U.S.C. 45(a)(2). That authority lies exclusively with the Department. As noted above, FTC and DOT both have authority over the unfair and deceptive practices of ticket agents selling air transportation.

[59] 49 U.S.C. 41712(a) ("the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.")

reflects a practice or policy affecting multiple consumers, rather than an isolated incident.[60] We concluded that "in general, the Department is of the view that proof of a practice in the aviation consumer protection context requires more than a single isolated incident. On the other hand, even a single incident may be indicative of a practice if it reflects company policy, practice, training, or lack of training."[61]

Effective Date

This guidance is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Issued on or about this 15th day of August, 2022, in Washington, D.C.

John E. Putnam,
General Counsel,
U.S. Department of Transportation.

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[60] *See, e.g.*, DOT Order 2018-2-7 (finding that an airline's failure to respond timely to a single complaint did not warrant enforcement action in the absence of evidence of a pattern or practice).

[61] 85 FR 78711.